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No. 147

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1941

R. E. OLDS, ET AL.,
PETITIONERS,

VS.

TOWN OF BELLEAIR,
RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

O. K. REAVES,
Attorney for Respondent.

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BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

R. E. Olds and others seek a review by certiorari of the judgment of the United States Circuit Court of Appeals for the Fifth Circuit handed down April 23, 1942 (*Town of Belleair, Appellant, v. R. E. Olds, Appellee,* 127 F. (2) 838), reversing a judgment of the United States District Court for the Southern District of Florida.

A CONCISE STATEMENT OF THE CASE

The petition and supporting brief are regrettably inaccurate in statements of fact and law, hence a very brief statement by respondent seems advisable.

The town of Belleair Heights, Florida, was incorporated in 1923. In 1924 it floated an issue of $300,-

Note: Italics supplied unless otherwise stated.

000 Public Improvement (commonly called Sea-Wall) Bonds; then an issue of $119,000 Paving Bonds. In 1925 the Legislature abolished the town of Belleair Heights and created instead the town of Belleair, which floated an issue of $700,000 Paving Bonds. All these issues were validated under the Florida law in uncontested proceedings in the Circuit Court. In 1935 an attempt was made to refund all these bonds, but certain citizens intervened in the proceeding in the State court to validate the refunding bonds, and the Supreme Court held that each of the said three issues of bonds was void because they were issued, and the proceeds used, for the benefit of private corporations, contrary to Section 7, Article IX, of the Florida Constitution. *State ex rel. v. Town of Belleair,* 125 Fla. 669, 170 So. 434. The bonds were also assailed on the ground that the Town had no power to incur the debt and for other reasons, but the Court passed only upon the one question.

Since the bondholders were not parties to this proceeding, a suit was promptly brought by taxpayers against the Town, its taxing officers, and the bondholders to enjoin the levy and collection of a tax to pay the bonds. A permanent injunction was issued by the trial court, but the Supreme Court (after first affirming the decree and several rehearings) finally held that the validity of the two issues of Paving Bonds was foreclosed by the validating decrees since the Town was authorized to issue such bonds, but that the issue of $300,000 Public Improvement Bonds was not authorized, and that

> ". . . the issuing authority being without power to issue bonds, a judicial validating decree could not confer validity";

wherefore

> "The power to issue bonds not having been attained, the bonds were void *ab initio.*"

Hence the decree was reversed and the cause remanded

> ". . . with directions that a decree be forthwith entered not inconsistent with the views herein expressed."

> *Olds et al. v. Alvord et al.,*
> 139 Fla. 747, 191 So. 434.

The mandate went down, and the trial court entered a new decree dated March 12, 1940 (R. 112), sustaining the two issues of Paving Bonds but permanently enjoining the assessment and collection of a tax to pay the $300,000 Public Improvement Bonds, stating that they were void *ab initio* (R. 117, par. 5).

In the meantime Olds, sensing defeat in the State court, on August 3, 1939, filed suit in the Federal Court (R. 1) seeking to recover on his bonds or, alternatively, for money had and received. The Town defended on various grounds (R. 8), among them that

First, the complaint fails to state a claim against defendant upon which relief can be granted;

Fourth, the Town was not authorized by statute or at all to borrow the money described in the complaint, but was prohibited from doing so; and

Seventh, that the bonds were issued, and the moneys expended, for the benefit of private corporations and not for public benefit, contrary to Section 5 and 7 of Article IX of the Constitution of Florida.

Judge Barker of the District Court overruled the first and fourth defenses, holding that while he must follow the State Supreme Court's decision that the bonds were invalid, the complaint "sets forth a case for relief upon the basis of money had and received" (R. 19). Thereupon an additional defense was filed (R. 19), setting forth the proceedings in the State court, and contending that the State court had determined that the bonds were issued, and the proceeds expended, for the benefit of private corporations, contrary to the Constitution, and, therefore, that question of fact could not be re-examined by the Federal Court. Responding to this defense, Olds filed objections (R. 119), with supporting affidavit by his counsel (R. 110), to which he attached a "certified copy of the final decree of the Chancellor in this cause entered by him in pursuance of the mandate of the Florida Supreme Court when the matter was finally determined by the decision of that Court" etc. (R. 111-112). Judge Akerman of the District Court, upon the Town's said motion, entered a summary judgment in its favor (R. 123). This judgment was reversed by the Circuit Court of Appeals on the ground that the *Florida trial court*—not the Supreme Court—

> ". . . entered new decree in which there was no mention of an unconstitutional private purpose or private use of proceeds of bonds";

hence

> ". . . if there was any relief available under Florida law growing out of the retention or use of bondholder's money for municipal purposes, resort thereto was not precluded by doctrine of 'estoppel by judgment.' "
>
> *Olds v. Town of Belleair,*
> 120 F. (2) 492.

The cause was remanded and tried before Judge Barker. The evidence clearly showed that the proceeds of the bonds were used to improve the private properties of the Belleair Hotel Company and others by building a bulkhead and filling in behind the same (R. 236, 276-285), and that it was unlawful for the Town to borrow the money or incur the debt[1]; notwithstanding which, the District Judge entered a judgment for the plaintiff, and it is from a reversal of that judgment that certiorari is now sought.

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1 "It shall be unlawful for the town of Belleair Heights, in any one year, to incur any indebtedness in excess of the appropriation for said year except as provided in this charter." Sec. 42, Ch. 9686, Laws of Florida. The Charter contained no applicable exception.

"It shall not be lawful for the government of any city or town to make appropriations, in any one year, for a greater amount than is allowed to be collected by taxation; and it shall not be lawful for any officer of a municipal government to issue a warrant on the treasurer except in payment of an appropriation." Sec. 3005, Compiled General Laws of Florida.

ARGUMENT

The petition seeks certiorari on two grounds (pp. 5 and 11):

— 1 —

> "The decision of the Fifth Circuit Court of Appeals that (R. 290) 'it is settled law that no such recovery (for money had and received) can be had in regard to monies obtained and spent by towns in violation of express prohibitions of Constitution or statute, and this is especially so when the prohibition violated is one against borrowing money without a vote of the people,' is directly contrary to the decisions of the Supreme Court of Florida, by which the Federal Courts are bound in a matter of state law."

The Florida court is in exact accord with the quoted statement of the Circuit Court of Appeals and exactly contrary to petitioners' statement. The Florida Supreme Court has never held that

> ". . . monies obtained and spent by towns in violation of express prohibitions of Constitution or statute"

could be recovered in a suit for money had and received or at all.

In the case of *State v. Greer,* 88 Fla. 249, 102 So. 739, principally relied upon by the petitioner, a statute *expressly* authorized the town of Quincy, Florida, to issue bonds

> ". . . for the purpose of erecting school houses and maintaining a system of public education in said municipality."
>
> Sec. 22, c. 5844, Acts of 1907.

Bonds were issued and were validated by Chapter 6095, Acts of 1909.

Thereafter, on February 21, 1911, the Supreme Court in *Brown v. City of Lakeland,* 61 Fla. 508, 54 So. 716, held that the Constitution *impliedly* forbade municipalities to issue bonds and to levy municipal taxes to pay bonds issued for the purpose of erecting school houses and maintaining a system of public education. Hence the Supreme Court said in *State v. Greer* that

> "The bonds were *expressly authorized by statute* and were issued as required by the statute. The proceeds were received by the municipality and used for its benefit. The *implied limitation* that was held by the court to make the issue of the bonds contrary to organic law, was developed by judicial interpretation after the bonds had been sold, and the money had been used by the city for its purposes as expressly and specifically authorized by the statute. These circumstances clearly render the municipality liable for the amount of the money so received by it, with interest."

It is also noticeable that a further act of the Legislature of Florida had authorized the municipality to return, with interest thereon, the money received by the city for the bonds in question. Each of these three acts is cited in the opinion.

Acts of the Legislature are presumed to be valid and must be obeyed by officers until judicially found invalid. *State ex rel. v. State Board etc.,* 84 Fla. 592, 94 So. 681.

The Florida law is clearly stated in the late case of *Board of Public Instruction v. Cooey,* 128 Fla. 591, 175 So. 219, as follows:

> "Rule which can be availed of by count for money had and received that one who has received from another money or property which in equity and good conscience he should refund, will be compelled to do so in so far as rendition of a judgment will effect such compulsion, even where it has no authority to borrow money, *if money so borrowed is used for a purpose within legitimate powers of corporation, and if there is no prohibition on such borrowing"* (2d headnote).

The opinion cites and quotes from numerous authorities, stating that recovery cannot be had on the common count

> ". . . where there is an express prohibition of the power to borrow money" — ". . . *since a promise cannot be implied in the face of express law, but only in cases where . . . there is merely a defect of power."*

In *Gulf Life Insurance Company v. Hillsborough County,* 129 Fla. 98, 176 So. 72, the Court gives the essentials of a complaint to state a cause of action as follows:

> "The declaration must show that the *roads in question were public roads* of the county and that the county *is now enjoying the fruits of the labor* and materials furnished by the contractor to improve them. *The declaration must also allege that the county is fully authorized to pay for the work and materials. The law has no reference to money, labor, or material wasted, misappropriated, or applied to roads not of a public nature.*"

No case cited by petitioners nor any case decided by the Florida court holds to the contrary.

The petition, on page 8, says:

> "The Charter of the Town of Belleair Heights expressly authorized the town to issue bonds in order to construct public improvements,"

and on page 20 it says:

> "Neither the Constitution of Florida, nor the charter of the Town, prohibited it from issuing bonds or from constructing these improvements."

To the contrary, the Supreme Court of Florida, in *Olds v. Alvord,* 191 So. on pp. 442-443, quotes and discusses the provisions of the town charter and holds that the Town at that time was *"without power to issue bonds,"* and that *"The power to issue bonds not having been attained, the bonds were void ab initio."* Also it says:

> "It so happens that the proceeds of this $300,000 issue was used for building a sea wall and making other improvements which were chiefly beneficial to a private corporation,"

which was, of course, expressly contrary to Section 7 of Article IX of the Constitution, which is quoted, construed, and the facts applied by said Court in *State v. Town of Belleair,* 125 Fla. 669, 170 So. 434. The quoted statements of counsel are also refuted by the decision of the Circuit Court of Appeals from which certiorari is now sought.

— 2 —

The next ground upon which certiorari is urged is that

> "The Circuit Court of Appeals has departed from the established rule of law that a decision of a Circuit Court of Appeals rendered on an appeal from a District Court becomes the law of the case and is controlling upon the Circuit Court in a second appeal in the same case."

There is no inconsistency between the two decisions of the Court in the Olds case. The first decision (120 F. 2d 492) is definitely confined to the law of "estoppel by judgment." The opinion concludes with the statement:

> "We pass only on the effect as an estoppel of the 'additional defense', and as to that the judgment is reversed and the cause is remanded for further proceedings."

The opinion held that there was no estoppel, because

> "The trial court thereupon entered a new decree covering the whole case, in which there was no mention of an unconstitutional private purpose or private use of proceeds of any bonds, but it was decreed 'the issue of $300,000 dated July 1, 1924, for money received by said Town and used in the construction of seawalls, are void ab initio for the reason that under and by virtue of Chapter 9686, Special Acts of 1923, the power of the Town of Belleair Heights to issue bonds did not accrue or exist prior to January, 1925.' . . . We think the issue as to the private object and use of proceeds of these bonds dropped out of the case and was unnecessary to be considered, and was in fact not decided *in this final decree.*"

Hence it is that the Court held that there was no estopped by judgment *because of the wording of the final decree of the trial court* and not because of what the Supreme Court had said.

The petitioners would have this Court believe that the Circuit Court of Appeals now treats the decision of the Florida Court as res judicata of the private purpose of the issue of the bonds and appropriation of the proceeds, and has followed it blindly as settling the law without passing upon the facts disclosed by the record; on the contrary, the Court distinctly passed upon the facts and the law. It says:

> ". . . plaintiffs were under a heavy burden to show that in fact and in law, the proceeds of the bonds, issued not merely irregularly but completely ultra vires, were so laid out by the

town in improvements beneficial to it, as to make it liable to plaintiffs for the value thereof to the town.

"This burden, heavy in fact and in law, plaintiffs have not sustained. On the contrary, the proof supports but one conclusion, that the monies were obtained and spent pursuant to the very plan and with the very result reprobated by the Supreme Court of Florida in the Town of Belleair Case, in these words: 'In view of these facts it would be difficult to conceive a more flagrant violation of Section 7, Article 9, than it would now be to impose a tax on the Town of Belleair to pay interest and retirement of these bonds.' "

The appellate court may look into the evidence to determine whether it is too insubstantial to justify a finding for the opposite party. *Southern Railway Co. v. Walters,* 284 U. S. 190, 52 S. Ct. 58.

We respectfully submit that the petition for certiorai should be denied.

Respectfully submitted,

O. K. REAVES,
Attorney for Respondent.